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No. 658

Supreme Court of the United States

OCTOBER TERM, 1934

MAX SENIOR,

Appellant,

v.

GEORGE C. BRADEN, QUINCY A. DAVIS, CARLETON S. DARGUSCH and ANTHONY J. KRAUS, constituting the Tax Commission of Ohio; ROBERT HEUCK, as Auditor of Hamilton County, Ohio, and HARRY A. FREIBERG, as Treasurer of Hamilton County, Ohio,

Appellees.

BRIEF FOR APPELLANT

INTRODUCTION

This case comes here on appeal from a judgment against appellant of the Supreme Court of Ohio (R. 167). It originated as a suit in equity by appellant, a resident in and taxpayer of the City of Cincinnati, Hamilton County, Ohio, against the members of the Tax Commission of Ohio, and the Auditor and Treasurer, respectively, of Hamilton County, Ohio, to enjoin the collection of an intangible property tax on equitable interests in real property in a form popularly called land trust certificates, owned by appellant, on the grounds that said tax was unauthorized by law, and, if authorized, was attempted to be assessed in violation of

the specific provisions of the Ohio Constitution and the Constitution of the United States of America and Amendments thereto.

In the Common Pleas Court of Hamilton County, Ohio, an injunction was granted, on the grounds that the provisions of the statutes attempting to tax the owner of these land trust certificates violate both the Ohio and the United States Constitutions. The opinion of the Common Pleas Court is reported in 30 Ohio Nisi Prius (New Series) 147 (R. 141).

The Court of Appeals reversed, holding that the statutes taxed these interests and that the provisions of the Ohio Intangible Tax Act, as so construed, do not violate any provision of the Ohio or United States Constitutions. The opinion of the Court of Appeals is reported in 48 O. A. 255, not yet published in a bound volume, but found in the advance sheets of Ohio State Bar Association Report for December 24, 1934 (R. 157).

The Ohio Supreme Court affirmed the judgment of the Court of Appeals, holding that the statutes apply and do not violate the Constitutions of Ohio or of the United States of America or any Amendments thereto. Its opinion is reported in 128 O. S. 597, not yet published in a bound volume, but found in the advance sheets of Ohio State Bar Association Report for December 17, 1934 (R. 168).

Statements as to the jurisdiction of this Court (printed separately) and of the points on which appellant intends to rely (R. 186) have already been filed. This Court noted probable jurisdiction on February 4, 1935.

STATEMENT OF THE CASE

1. The Statutes Involved

In 1931 the Ohio General Assembly (hereinafter referred to as the Legislature) passed an act entitled "An Act pro-

viding for the levy of taxes on intangible property at classified rates and for the assessment of tangible personal property for taxation" (114 Ohio Laws 714). This amended certain sections of the Ohio General Code. The first amended section was Section 5323 (*id.* 715), defining "investments" for the purposes of the act. This entire section is set forth in the appendix to this brief. The parts pertinent to this case read as follows:

> "The term 'investments' as used in this title, includes the following:
>
> . . . . . .
>
> Annuities, royalties and other contractual obligations for the periodical payment of money and all contractual and other incorporeal rights of a pecuniary nature whatsoever from which income is or may be derived, however evidenced, excepting . . . (2) interests in land and rents and royalties derived therefrom, other than equitable interests divided into shares evidenced by transferable certificates. . . ."

Section 5388 (*id.* 720) specifies the rules for listing and assessing personal property. This entire section is set forth in the appendix to this brief, but the pertinent parts thereof read as follows:

> "In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, excepting as otherwise provided in this chapter, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either of the first two subparagraphs of section 5323 of the General Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at the true value thereof, in money, on the day as of which such investments are required to be listed.

Section 5389 (*id.* 721; see appendix for entire section) defines "income yield" as follows:

> "'Income yield' as used in section 5388 of the General Code and elsewhere in this title means the aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year, and includes the following:
>
> ". . . in the case of equitable interests, the cash distributions of income so made."

Section 5638 (*id.* 722; see appendix for entire section) reads in part:

> "Classification of intangible property and rate of taxation.
>
> "For the purpose of the general revenues of the municipal corporations, school districts and special taxing districts in this state, and to lessen the burden of general taxation on real property, taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the grand classified tax list and duplicate of the state of Ohio at the following rates, to-wit: investments, five per centum of income yield; unproductive investments, two mills on the dollar."

Before the enactment of the Intangible Tax Act, Section 5322, which remains in effect unchanged and has not been amended since the adoption of the official code of 1910 (2 General Code of Ohio, 1910, 1145), defines "real property" and "land" as follows:

> "'Real property' and 'land.' The terms 'real property' and 'land' as so used, include not only land itself, whether laid out in town lots or otherwise, with all things contained therein but also, unless otherwise specified, all buildings, structures, improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging, or appertaining thereto."

Acting under the above provisions of the Intangible Tax Act, the State Tax Commission and the local taxing authorities required the listing of land trust certificates and would have required the payment of the five per cent tax based on the "income yield" thereof had not the injunction in this cause been granted appellant in the Common Pleas Court (R. 49, 50).

2. Statement of Facts

The appellant, Max Senior, was, on January 1, 1932, the tax date involved in this controversy, the owner of certain land trust certificates set forth in the petition (R. 42) as admitted by the auditor's and treasurer's answer (R. 48). (See, also, testimony of Senior, R. 56.) These are:

Lincoln Inn Court ground rent, Cincinnati, Ohio;
Clark-Randolph Building Site, Chicago, Illinois;
Woman's City Club, Cincinnati, Ohio;
Rockefeller Building, Cleveland, Ohio;
Insurance Exchange Building, Boston, Massachusetts;
City National Bank Building, Omaha, Nebraska; and
Fidelity Mortgage Company, Cleveland, Ohio.

Four of the pieces of real estate for which land trust certificates were issued are represented by property located in Ohio. One of these is the Lincoln Inn Court ground rent, Exhibit 1 (R. 65-67). The declaration of trust is Exhibit 9 (R. 82 to 93, inclusive). It has been stipulated that the decision on the land trust certificates with reference to the property located on East Sixth Street, Cleveland, Ohio, Exhibit 7 (R. 75 to 82), shall be controlling with respect to the other certificates of equitable ownership on Ohio real estate, other than the Lincoln Inn ground rent (R. 7 and 183).

Three of the pieces of property represented by land trust certificates are located outside of Ohio, one in Massa-

chusetts, one in Nebraska and the third in Illinois. It has been stipulated that the decision as to land trust certificates of equitable ownership in the Clark-Randolph Building Site, located in Chicago, Illinois, represented by Exhibit 2 (R. 67 to 75), shall be controlling with respect to the other certificates of equitable ownership on real estate situated outside of Ohio (R. 7 and 183).

Appellant returned all of his taxable personal property, and included the land trust certificates in the list of personal property, as required by the Tax Commission. He paid the tax on everything except the land trust certificates (R. 56, 140). This suit was brought to restrain the assessment and collection. The injunction allowed is still in force and will be until the case is finally determined by this court (R. 34-36 and 183).

It is stipulated that the customary real estate taxes had been levied and assessed against the respective properties which were the subjects of the trust agreements and certificates involved in this case and that the taxes had been assessed in the names of the legal owners or lessees thereof according to law, without any deduction or diminution by reason of plaintiff's (appellant's) claimed interests in said lands (R. 59).

A. The Lincoln Inn Court Ground Rent

The certificate for the Lincoln Inn Court ground rent recites that it is a "Certificate of Interest in Ground Rent" (Exhibit 1, R. 65). It reads:

> "Whereas Max Senior has this day purchased and paid for an undivided interest in said premises amounting to 340/1275ths.
>
> "Now therefore, this certificate witnesseth that said Max Senior is the owner of an undivided 340/1275ths interest in the premises described in said lease" (R. 65-66).

The premises described are:

> "the premises at the northwest corner of Main Street and Patterson Alley in Cincinnati, fronting seventy-six feet and three inches, more or less, on the west side of Main Street, and being the property on which the Lincoln Inn Court Building is located" (R. 65).

The effect of his ownership is to entitle him to receive his proportionate share of the rents reserved and paid under the lease. The lease is for ninety-nine years, renewable forever, with the privilege of purchase after ten years, to Charles F. Dickson (R. 65). The appellant had an undivided interest and would have been entitled at any time to a special warranty deed for his interest (R. 66).

B. The Clark-Randolph Building Site, Chicago

The holder of a land trust certificate in the Clark-Randolph Building Site located in Chicago, Illinois, on the other hand, has, by the express terms of the certificate, an "equitable ownership" in the building site (Exhibit 2, R. 67). The certificate reads:

> "Max Senior is registered on the books of the Trustee hereinafter named as the owner of five three thousand two hundred and fiftieths (5/3250ths) of the equitable ownership and beneficial interest in certain property located at the northeast corner of Clark and Randolph Streets, Chicago, Illinois, fronting approximately one hundred and eighty feet on the easterly side of Clark Street, and approximately one hundred and sixty feet on the northerly side of Randolph Street, the title to which is held by Chicago Title and Trust Company, as Trustee for the benefit of the holder or holders of this Certificate and of similar Certificates issued or to be issued by the Trustee to evidence ownership of said beneficial interest in said property so held by it in trust" (R. 67 and 68).

The real estate described is leased for the term of ninety-nine years, with a privilege of renewal for another term of ninety-nine years and also with the privilege of purchase (R. 69 and 70). The equitable title represented by the land trust certificate must be conveyed with the same formality as a deed (R. 72-74). The certificate itself recites in a note:

> "This transfer deals with an interest in Illinois real estate" (R. 72).

In another note it is provided:

> "The execution of the above instrument of transfer must be acknowledged before a notary public or other officer authorized by the laws of the State of Illinois to take acknowledgments of deeds and in the manner in said laws more particularly set forth to constitute such acknowledgments valid and legal acknowledgments under the then existing laws of said State" (R. 74).

The spouse must release dower (R. 72).

C. The East Sixth Street, Cleveland, Ohio, Property

The land trust certificate of the property leased to the Fidelity Mortgage Company, in Cleveland, Ohio, recites that it is a "Land Trust Certificate of Equitable Ownership in Property located on East Sixth Street, Cleveland, Ohio" (Exhibit 7, R. 75). The certificate reads:

> "Max Senior is the owner of six one thousand and fiftieths (6/1050ths) of the equitable ownership and beneficial interest in certain property located at 1940 East Sixth Street, opposite Vincent Street, in the City of Cleveland, Ohio" (*ibid.*).

The property is leased to the Fidelity Mortgage Company for ninety-nine years, renewable forever (R. 77). The

form of "assignment" specified on the certificate is the form for the transfer of real estate (R. 79-82). "Two witnesses are required" (R. 80). The acknowledgment recites that the individual acknowledges that he signed a "conveyance" (ibid.). There is a note that:

> "The execution of the above assignment must be acknowledged before a notary public or other officer authorized by the laws of the State of Ohio to take acknowledgments of deeds" (R. 82).

D. The Declaration of Trust

1. Re Clark-Randolph Building Site

Coming to the declaration of trust of the Trustee for the Holders of Land Trust Certificates of Equitable Ownership in the Clark-Randolph Building Site, of Chicago (Exhibit 10, R. 94), we find that the trustee is holding the title acquired by it to:

> "Lots Five (5) and Six (6) in Block Thirty-five (35) in the Original Town of Chicago" (R. 95).

The deed to the trustee is dated March 1, 1928, but was in fact executed and delivered simultaneously with the declaration of trust. The premises are subject to an Indenture of Lease by and between William G. Pohl and wife, who conveyed to the trustee as lessors, and Leo M. Sage, as lessee, also dated March 1, 1928 (R. 95). This lease is for a period of ninety-nine (99) years, renewable at the option of the lessee for one additional term of ninety-nine (99) years (R. 96), with privilege of purchase by the lessee. This privilege of purchase is for amounts ranging from three million, four hundred twelve thousand, five hundred dollars ($3,412,500.00) to three million, two hundred sixty-six thousand, two hundred and fifty dollars ($3,266,250.00), depending upon when the privilege is exercised (R. 99).

The land trust certificate holder is entitled to his proportionate share of the net rent, when, as and if collected by the trustee (R. 98), and his proportionate share of the purchase price, in case privilege of purchase is exercised (R. 100), or his proportionate share of the property held in trust in case there is default and the trustee decides to distribute, instead of making a sale (R. 115, 116).

The declaration of trust may be amended from time to time or the trust terminated by written instrument executed and acknowledged by the trustee and consented to in writing by the owner or owners of three-fourths in amount of the interests issued and outstanding (R. 115). It is provided that no such amendment shall increase the liabilities of the lessee under the lease without its consent nor shall it deprive or take from the trustee the control and/or the discretion conferred upon it under the declaration of trust, nor shall it confer upon the owner or owners of outstanding shares, or any of them, any control over or voice in the administration of the trust. A copy of any such instrument must be filed by the trustee in the Recorder's office of Cook County, Illinois (R. 115). The holder of a land trust certificate has no authority to control the trustee in any manner, nor has he any voice whatsoever in the management of the property.

Article V of the Declaration of Trust (R. 105) provides in part:

> "In the event that the Lessee shall make default in any of the provisions of the Lease, so that it shall become necessary, or in the opinion of the Trustee advisable, for the Trustee to terminate the same, then the Trustee shall have full authority to terminate the Lease and to sell the Trust Estate and terminate the trust, and in such case or in any other contingency either with or without terminating the lease to take such other action with respect to the Lessee, the Lease or the Trust Estate as it shall deem advisable, without

> reference to the Beneficiaries and as if it were the sole legal and equitable owner thereof, and no person dealing with the Trustee shall be bound or privileged to inquire concerning the authority of the Trustee so to act."

Transfers of land trust certificates and the equitable interests evidenced thereby are filed by the trustee for record in the office of the Recorder of Deeds of Cook County, Illinois (R. 108), and a certificate of title is given by the Chicago Title & Trust Company to each new land trust certificate holder (R. 109). Article XIV of the Declaration of Trust provides in part (R. 115-116):

> "In any case of the termination of this trust otherwise than upon the exercise by the Lessee of its option to purchase the Trust Estate, distribution shall be made by the Trustee in kind by conveyance of the Trust Estate in undivided legal interests, or at the election of the Trustee, by sale and distribution of proceeds as in this Declaration provided. Upon a conveyance by the Trustee of the Trust Estate in undivided legal interests, as herein provided, all of the Certificates issued hereunder and then outstanding, including those in the Depreciation Fund, as well as any held by the Lessee, shall be cancelled by the Trustee."

2. Re East Sixth Street, Cleveland, Ohio

The trustee for holders of land trust certificates of equitable ownership in property located on East Sixth Street, Cleveland, Ohio, is The Midland Bank, of Cleveland, Ohio, which holds the fee, subject to a lease to The Fidelity Mortgage Company, Exhibit 19 (R. 117). There is a full description of the real estate held in trust (R. 118-119) which begins:

> "Situated in the City of Cleveland, County of Cuyahoga and State of Ohio, and known as being part of Original Two Acre Lot No. 92, and bounded and described as follows."

The premises are subject to an Indenture of Lease by and between the Trustee, as lessor, and The Fidelity Mortgage Company, as lessee, dated July 1, 1925 (R. 120), which is the same date as the Declaration of Trust. The term of the lease is for ninety-nine (99) years, renewable for further terms of ninety-nine (99) years each forever (R. 120). The rental is fifty-seven thousand, seven hundred and fifty dollars ($57,750.00) a year for the first fifteen (15) years and sixty-six thousand, nine hundred dollars ($66,900.00) a year for the balance of the term, payable quarterly, plus compensation to the Trustee, all taxes, assessments, levies and public charges levied or assessed upon the leased premises or any improvements thereon, and any additional charges, costs and expenses of the Trustee (R. 120-121).

The other essential features are substantially the same as those noted in connection with the Declaration of Trust of the Clark-Randolph Building Site, except that there are no specific provisions requiring transfers of land trust certificates to be recorded in the office of the County Recorder, new certificates of title to be given to the purchasers or transferors, or relating to conveyance of the property by undivided interests to the certificate holders in case of default by the lessee. Article X (beginning at R. 130) provides in part:

> "In the event that the Lessee shall make default in any of the provisions of the Lease so that it shall have become necessary, or, in the opinion of the Trustee advisable, for the Trustee, as Lessor, to terminate the same, the Trustee shall give not less than fourteen (14) days' notice thereof to the Beneficiaries by registered letter mailed to their last addresses, as furnished by them to the Trustee, such notice to be deemed commenced with the mailing of said letters, and shall request therein advice as to whether the property should be offered for sale, or whether another lease thereof should be made, if possible. If the holders of not less

than a majority in interest of the outstanding Certificates shall, within fourteen (14) days after the expiration of the period of notice above provided, notify the Trustee, in writing, of their agreement upon the course to be taken, the Trustee shall endeavor in its discretion to comply with their wishes. In the event of the failure or neglect of the holders of not less than a majority in interest of the outstanding Certificates to express their wishes within the period above provided, or, in the event the Trustee shall find, after making reasonable efforts, that it is impracticable to comply with such expressed wish of said Certificate holders, it shall have full authority to take such action with respect to selling, leasing for ninety-nine (99) years renewable forever, or for lesser terms, managing, operating or otherwise disposing of said property as it may deem advisable and for the best interest of said Certificate holders."

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED

The appellant intends to rely on the assignments of error, numbered 1 to 8, inclusive, set forth in its Petition for Appeal (R. 180-182).

QUESTIONS INVOLVED

1. Is the interest of a land trust certificate holder an interest in real property?

2. If so, may Ohio, consistently with the provisions of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution, tax such interest in real property located outside of Ohio?

3. If it is an interest in real property, may Ohio, consistently with the provisions of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution, tax such interest in real property, when Ohio has already levied and assessed real estate taxes against

the respective properties in the names of the legal owners or lessees thereof, according to law, without any deduction or diminution by reason of the appellant's claimed interest in said real property?

4. Does it constitute unconstitutional discrimination to tax equitable interests in land "divided into shares evidenced by transferable certificates" and to exempt from taxation (a) the same equitable interests when not represented by such certificates; and (b) legal interests in land, whether divided into shares or not, and whether represented by transferable certificates or not?

5. Does the Ohio intangible tax levy an income tax on land trust certificates and, if it does purport to do so, would not that violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States with respect (a) to all property, whether located in or outside of Ohio; (b) to property located outside of Ohio?

ARGUMENT

I. The Interest of a Holder of a Land Trust Certificate is an Interest in Real Property

It has been frankly admitted by opposing counsel in their briefs in the Court of Appeals for the First District of Ohio and in the Supreme Court of Ohio that if appellant's interests evidenced by the land trust certificates in question are interests in real estate, then they cannot constitutionally be taxed in Ohio; but it was contended by appellees that they are in the nature of choses in action and, therefore, subject to valid provisions of the Ohio Intangible Tax Law.

The Section of the General Code of Ohio (5323) which defines "investments" for purposes of taxation clearly defines these "investments" as "interests in land."

"Interests in land and rents and royalties derived therefrom" are therein exempted from taxation, except:

> *"Equitable interests"* (*i. e.*, in land) *"divided into shares evidenced by transferable certificates."*

See, also, Sec. 5322, quoted *supra*. When the statute itself in terms refers to this species of property as "interests in lands," that ought to be conclusive that for the purposes of the statute they are such.

Moreover, land trust certificates had previously, in 1926, been recognized by the Attorney General of Ohio as interests in real property and, therefore, not subject to taxation as personal property under the then existing statutes which taxed all personal property at a uniform rate. See 1926 *Opinions of Attorney General of Ohio*, 375 (No. 3640). The syllabus of that opinion reads:

> "Holders of land trust certificates issued under a declaration of trust executed by the Cleveland Trust Company of Cleveland, Ohio, as trustee, dated June 1, 1922, are not required to list said certificates for taxation."

In the course of his opinion, the Attorney General said (pp. 376, 377):

> "The land trust certificate is exactly what its name implies—a certificate evidencing an interest in the equitable ownership of land held in trust, and is, therefore, a real estate investment. It is not in any sense a mortgage, a leasehold bond or note, but is an evidence of actual ownership in whatever property may be trusteed as a basis for the issuance of any particular series or designation of certificates. The certificate is merely an evidence of the holder's simple individual share in the ownership of large parcels of property.
>
> "As these certificates are merely an evidence of ownership they have, of course, no par value or other fixed nominal value. Nothing but custom and convenience

govern the price at which the certificates are sold and the interest which accrues thereupon. As the land trust certificate is merely an evidence of ownership, there is, of course, no such thing as maturity; and as it is merely evidence of equitable ownership of real estate, no personal property taxes are payable thereon.

"In the case of *Morrison* v. *Manchester*, 58 N. H. 538, at page 563, it is stated that:

> "'When an owner has left his farm in trust for his widow and children, and the trustee holding the legal title without any beneficial interest pays the farm taxes and expenses out of the farm income, and pays the rest of the income to the widow and children, a second tax for the same amount is not assessed on the equitable title of the widow and children. For the purpose of taxation the legal title of the trustees and the equitable title of the widow and children are not more than the whole title, legal and equitable, which the testator had in his lifetime. If the testator, dividing the equitable title and beneficial interest into four shares, gave two shares to his widow and one share to each of his two children, directed the trustee to issue to them certificates as evidence of their respective rights in the trust property, the united title of the trustee and the widow and children would not be more than the title of the testator.'

"In *Sears on Trust Estates in (as) Business Companies*, it is stated in section 114, at page 168, that:

> "'It seems impossible to find any case maintaining or attempting to maintain the proposition that the legal and equitable interest in the same property may both be taxed, at least where trustee and beneficiaries reside in the same state. On the contrary, all theory of this being lawful as to capital stock and shares of stock of a corporation is that they are distinct and independent properties, there being a legal interest in the former, and

> a legal interest in the latter, that is to say, diverse legal interests in different things. In a trust there is a legal interest and its dependency, an equitable interest. If the latter is destroyed, a beneficiary ceases to be, but the property resumes the status it had before the subsidiary interest began.'

"It is therefore believed that the holders of the land trust certificates authorized under the aforesaid declaration of trust are not required to list them for taxation.

"You further inquire if it would make any difference if the real estate in question was located outside of Ohio, or the trustee was a non-resident of this state; or if the trustee was a non-resident and the land was also without the state.

"It is believed that the said statement of changed status would make no difference in our answer as before herein stated.

"In *Sears Trust Estates*, page 168, it is stated that:

> "'Therefore it may be said that in the state where both trustees and cestui que trust reside one tax is all that may be imposed; and if they reside in different states, the tax is imposed where the property is held.'"

Later, the Attorney General was called upon to determine the relation of dealers in land trust certificates to the Ohio Blue Sky Law. (1926 *Opinions of Ohio Attorney General*, 528, No. 3869.) The syllabus of that opinion reads:

> "The sale of land trust certificates representing part of the equitable ownership in the premises to be occupied by the Bankers Building at Chicago, is a sale of foreign real estate and subject to the provisions of section 6373-15 of the General Code."

These opinions as to the nature of land trust certificates were followed by the Probate Courts (R. 33) and by the administrative authorities in Ohio.

Following the opinions rendered by the Attorney General of Ohio land trust certificates increased in popularity. The typical ones involved in this case, Exhibits 1, 2 and 7 (R. 67 and 75), are dated respectively December 14, 1929 (R. 67), December 26, 1929 (R. 71), and May 29, 1931 (R. 79).

Much of the savings of conservative investors in cities like Cincinnati had been invested in lands in the business district, subject to ninety-nine year leases. As these lands increased in value, it became impractical for many persons of moderate means, who desired this type of investment, to purchase a single piece of business property, subject to a ninety-nine year lease. To meet this need, the plan for issuance of land trust certificates was devised. Real estate was then and still is taxed by uniform rule at its full value. See Article XII, Section 2, of the Constitution of Ohio and Section 5328 (for full text, see appendix; 114 O. L. 717).

The essential rights and obligations of an equitable owner of real estate have long been recognized in Ohio as the same as those of a legal owner. A judgment for specific performance may operate as a conveyance of the defendant's title. General Code of Ohio, Section 11590 (see appendix for full text; 3 General Code of Ohio, 1910, page 2840, enacted as early as 1853; 51 O. L. 119). The purchaser of real estate was liable for any loss to the improvements on the property from the time of his contract, even before he had a deed, unless he stipulated to the contrary in the agreement.

Oak Building & Roofing Co. v. *Susor*, 32 Ohio Appeals 66 (Lucas County, 1929).
Gilbert & Ives v. *Port*, 28 O. S. 276 (1876, semble).

The first reference by the Ohio Legislature to land trust certificates was in 1919, when it made them, subject to certain specified restrictions, legal as investments for savings banks. Ohio General Code, Section 710-140(d). (108 Ohio

Laws, Part 1, 116. The full text of this law appears in the appendix to this brief.)

In 1928 there appeared in 2 *Cincinnati Law Review* 255 an article on "Land Trust Certificates With Relation to Ohio Law." This article showed that the legal incidents governing the holder thereof were the same as those of any other interests in real property. On pages 255 and 256 of this article appears this conclusion:

> "The result is that the land trust certificate holder has an equitable, instead of a legal, interest in the real estate. While this changes slightly the legal situation, the holder, for purposes of transfer, descent and most of the ordinary incidents of ownership, is in the same position as if he held the legal title, with certain exceptions that will be discussed hereafter."

This statement was based on two Ohio decisions: *Lessee of Avery* v. *Dufrees*, 9 Ohio 145 (1839), and *Biggs* v. *Bickel*, 12 O. S. 49 (1861). The former case held equitable interests in land should be treated the same as legal interests, so far as the laws of descent in Ohio were concerned. Judge Hitchcock said on page 147 of that case:

> "What is *real estate?* I take it to be the interest which a man has in land, tenements or hereditaments. If it be such an interest as can be enforced in a court of law, it is a legal interest or estate. If it be such as can only be enforced in a court of chancery, it is an equitable interest or estate. But in either case it is 'real estate' or property."

In *Biggs* v. *Bickel*, 12 O. S. 49 (1861), it was held (syllabus, third paragraph):

> "That the equitable interest of B. in the land was 'real estate' within the meaning of the statute of 1824, and subject to sale under the statute."

See, also, comment of Judge Sutliff, page 59.

In *Bolton* v. *Bank*, 50 O. S. 290, the second paragraph of the syllabus reads:

> "Equitable estates vest and descend as legal estates."

In Ohio, since 7 O. S. 155 (1858), the syllabus of the case has been written by the court and represents the law of the case. 14 Ohio Law Reporter 469, 5 O. S. vii, 6 O. S. viii. See the opinion of Judge (later United States Circuit Judge) Donahue in *State ex rel. Donahey* v. *Edmondson*, 89 O. S. 93 (1913), at page 107, as follows:

> "It has long been the rule of this court that the syllabus contains the law of the case. It is the only part of the opinion requiring the approval of all the members concurring in the judgment."

In *Zumstein, Treasurer*, v. *Coal & Mining Co.*, 54 O. S. 264 (1896), Judge Shauck said at page 271:

> "The term 'lands' when not restricted in meaning by related provisions, includes all interests therein."

As stated in 2 Cincinnati Law Review 255:

> "The land trust certificate merely represents a split up for the convenience of the ordinary investor of the ancient form of investment known as the 'ground rent.'"

In *McCammon* v. *Cooper*, 69 O. S. 366 (1903), the Supreme Court of Ohio held (first paragraph of syllabus):

> "A 'ground rent' being an estate of inheritance in the rent of lands, is a freehold estate, and is a right to and interest in the lands within the meaning of section 4158, Revised Statutes, relating to descent and distribution."

Bank v. *Logue*, 89 O. S. 288 (1914), decided that execution could be levied on equitable interests in real estate in

the same manner as on legal interests. This exhausts the legislation, literature and decisions in Ohio regarding land trust certificates and the nature of equitable interests, where the trust *res* is land.

This Court, in *Brown* v. *Fletcher*, 235 U. S. 589, held that an equitable interest is not a chose in action, but an interest in property. The question arose with regard to the jurisdiction of the District Court of a suit by a nonresident assignee of an equitable interest against the assignor and the trustee, both residents of the same state. The District Court held that under the provisions of Section 24 of the Judicial Code, which limited jurisdiction of the United States District Court when suit was brought therein "to recover upon any promissory note or other chose in action in favor of any assignee" (235 U. S. at page 595), it had not jurisdiction. This Court reversed that holding. Mr. Justice Lamar, speaking for the entire court, said (pages 597 and 598):

> "If the trust estate consisted of land it would not be claimed that a deed conveying seven-tenths interest therein was a chose in action within the meaning of section 24 of the Judicial Code. If the funds had been invested in tangible personal property, there is, as pointed out in the *Bushnell Case*, nothing in section 24 to prevent the holder by virtue of a bill of sale from suing for the 'recovery of the specific thing or damages for its wrongful caption or detention.' And if the funds had been converted into cash, it was still so far property—in fact instead of in action—that the owner, so long as the money retained its earmarks, could recover it or the property into which it can be traced, from those having notice of the trust. In either case, and whatever its form, trust property was held by the Trustee,—not in opposition to the *cestui que trust* so as to give him a chose in action, but—in possession for his benefit in accordance with the terms of the testator's will."

The court said further on pages 598 to 600:

"But here there was no contract and this is not a suit for a breach of a contract. For whatever may have been the earlier view of the subject (Holmes Common Law, 407, 409) the modern cases do not treat the relation between Trustee and *cestui que trust* as contractual. The rights of the beneficiary here depended not upon an agreement between him and Braker, but upon the terms of the will creating the trust and the duty which the law imposed upon the Trustee because of his fiduciary position. And a proceeding by the beneficiary or his assignee for the enforcement of rights in and to the property, held—not in opposition to but—for the benefit of the beneficiary, could not be treated as a suit on a contract, or as a suit for the recovery of the contents of a chose in action, or as a suit on a chose in action. *Upham* v. *Draper*, 157 Massachusetts 292; *Herrick* v. *Snow*, 94 Maine 310. See also *Edwards* v. *Bates*, 7 Man. & G. 590; *Nelson* v. *Howard*, 5 Maryland 327.

"The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action. For he had an admitted and recognized fixed right to the present enjoyment of the estate with a right to the corpus itself when he reached the age of fifty-five. His estate in the property thus in the possession of the Trustee, for his benefit, though defeasible, was alienable to the same extent as though in his own possession and passed by deed. *Ham* v. *Van Orden*, 84 N. Y. 257, 270; *Stringer* v. *Young, Trustee*, 191 N. Y. 157; *Lawrence* v. *Bayard*, 7 Paige 70; *Woodward* v. *Woodward*, 16 N. J. (Eq.) 83, 84. The instrument by virtue of which that alienation was evidenced,—whether called a deed, a bill of sale, or an assignment,—was not a chose in action payable to the assignee, but an evidence of the assignee's right, title and estate in and to property. Assuming that the transfer was not colorable or fraudulent, the Federal statutes have always permitted the vendee or assignee to sue in the United States courts to recover

> property or an interest in property when the requisite value and diversity of citizenship existed. *Barney* v. *Baltimore*, 6 Wall. 280. The equity jurisdiction of such courts extends to suits by heirs against executors and administrators (*Security Co.* v. *Black River Bank*, 187 U. S. 211, 228) and to suits against Trustees for the recovery of an interest in the trust property by the beneficiary or his assignee."

See, also, *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83.

The Comptroller of the Currency considers land trust certificates interests in real estate: national banks are forbidden to own them. (See, testimony of Rowe, R. 61.)

Land trust certificates representing interests in real estate in Ohio have been held not subject to personal property taxes in Rhode Island, on the ground that they represent interests in Ohio real estate. In *Narragansett Mutual Fire Ins. Co.* v. *Burnham*, 51 R. I. 371 (1931) the court said (page 375):

> "In our opinion the land trust certificate owned by the petitioner is not a security within the meaning of the statute but is a muniment of title to an equitable interest in real estate in Ohio. Such appears to be the status of these certificates in that State. No Ohio decision bearing upon this question has been called to our attention, due doubtless to the fact that no attempt has been made to tax them there as personal property under the advice of the attorney general that land trust certificates similar to those in the case before us represent an equitable interest in real estate and are not taxable as personal property. Opinion No. 3640 of the Attorney General of the State of Ohio."

In *Bates* v. *Decree of Court*, 131 Me. 176 (1932), it was held that a certificate of beneficial interest in Massachusetts real estate trust was not subject to inheritance taxa-

tion by the State of Maine, because it was an interest in realty located in Massachusetts.

In *Morrison* v. *Manchester*, 58 N. H. 538 (1879), at 563, the court said:

> "The division of the title into legal and equitable parts is not a multiplication of the property."

The Massachusetts courts, while uniformly holding that an equitable interest in real estate, evidenced by a pure trust, is real property, have distinguished the cases of the management type of trust, popularly known as "Massachusetts trusts," which are held to be associations. In these associations the *cestui que trust* is held to have an interest analogous to that of a stockholder in a corporation and this is held to be personal property. The beneficiaries of pure real estate trusts have been held not taxable on trusts in land located outside Massachusetts, while the beneficiaries of management or business trusts have been held taxable.

Dana v. *Treasurer and Receiver General*, 227 Mass. 562 (1917).
Priestley v. *Burrill*, 230 Mass. 452 (1918).
Williams v. *Milton*, 215 Mass. 1 (1913).

The court held in the *Williams* case that the Boston Personal Property Trust was a pure trust and not a partnership because it provided for no meetings of the *cestuis*, though their consent was required, without a meeting, for certain actions of the trustees. The trustees had a right to sell the trust securities and reinvest the proceeds and also a limited power to borrow on the security of the trust property. The sole substantial rights of the *cestuis que trustent* were to have the property administered in their interest by the trustees, to receive income while the trust lasted, and their share of the *corpus* when the trust came to an end.

Those are exactly the rights which the *cestui* has in the principal case and he is, therefore, the beneficiary of a pure trust, and not a shareholder or partner.

The United States courts have had occasion to distinguish pure trusts from business organizations operating under the name and form of trusts, in several recent cases involving federal taxation. In *Hecht* v. *Malley*, 265 U. S. 144, the question was whether certain "Massachusetts Trusts" were taxable under the Revenue Act of 1918 as "associations." The trusts in that case, which were of the management type, were held to be associations. In distinguishing between pure trusts, which would not be taxable, and the other kind which would, this Court said (page 147 of 265 U. S.):

> "Under the Massachusetts decisions these trust instruments are held to create either pure trusts or partnerships, according to the way in which the trustees are to conduct the affairs committed to their charge. If they are the principals and are free from the control of the certificate holders in the management of the property, a trust is created; but if the certificate holders are associated together in the control of the property as principals and the trustees are merely their managing agents, a partnership relation between the certificate holders is created."

Applying that test to the present case we find that the trustee, which is in each instance a bank or trust company, and which holds only one piece of property in trust, is "free from the control of the certificate holders in the management of the property." Therefore, a pure trust is created. See, *Crocker* v. *Malley*, 249 U. S. 223.

In *Commissioner of Internal Revenue* v. *Brouillard*, 70 Fed. (2d) 154 (C. C. A. 10, 1934) a similar question was raised. The court, citing all the federal decisions on the subject, held that the entities in question should have been

taxed as trusts, not as associations. The court on page 157, in the footnote, cites Article 1504 of Regulation 45, under the Revenue Act of 1918, and similar articles under the later Revenue Acts, as showing the distinctions between the pure trust and the management type of trust.

See, also, *Tyson v. Commissioner of Internal Revenue*, 54 Fed. (2d) 29 (C. C. A. 7, 1931).

The General Counsel of the Bureau of Internal Revenue has ruled that the rentals received by a trustee for land trust certificate holders are not subject to corporation taxes as income received by an association. General Counsel's Memorandum 1940, Cumulative Bulletin VII-7-3606 (page 2) (1928).

The significance to our case of these federal cases, and other similar cases cited in the cases mentioned, is that in none of the trusts involved in the principal case is there anything in the nature of a conduct of a business by the trustee, nor is there any control of the acts of the trustee by the certificate holders, "whether through the right periodically to elect trustees or otherwise." The authorities impose the tax only when the trustee is actually engaged in conducting some business and the *cestuis* have some measure of control. The receipt by the lessor of income from leased property and its distribution do not constitute "doing business." *McCoach* v. *Minehill Railroad Co.*, 228 U. S. 295; *Emery, Bird, Thayer Realty Co.* v. *United States*, 198 Fed. 242 (D. C. W. D. Missouri, W. D. 1912).

The fact that under certain circumstances the trustee might, at a future date, have the power to sell and distribute the proceeds, would not work an equitable conversion, changing the interest of the *cestui* from real estate into personalty. This was held in the *Dana* and *Priestley* cases, cited *supra*, which are in accord with *Smith, Admr.*, v. *Loewenstein*, 50 O. S. 346 (1893). In that case there was

a lease of a parcel of land for ninety-nine years renewable forever with privilege of purchase. The privilege was exercised by the lessee after the death of the lessor. The question was whether the real estate was realty or personalty in the hands of the lessor's administrator. The court held that it was real estate, as the option to convert into personalty had not been exercised until after the death of decedent, and would not relate back to the time of the execution of the lease. See, also, on this question, *Baker* v. *Commissioner of Corporations and Taxation*, 253 Mass. 130.

See, also, *Bartlett* v. *Gill*, 221 Fed. 476 (1915), affirmed by the Circuit Court of Appeals for the First Circuit in *Gill* v. *Bartlett*, 224 Fed. 927; *Wheless* v. *Wheless*, 92 Tenn. 293 (1893); and *National Department Stores* v. *Board of Equalization and Review of Ohio County*, 111 W. Va. 203 (1931).

Coming now from the decisions to opinions of text writers, we find the following:

In *1 Perry on Trusts* (Seventh Edition) 7, the author says,

> "Thus interests in land became of three kinds: first, the estate in the land itself, the *old common-law fee;* secondly, the *use,* which was originally a creature of equity, but after the statute of uses it drew the estate in the land to itself, so that the fee and use were joined and made but one legal estate, not differing from the old common-law fee except in the manner of its creation; and, thirdly, the trust of which the common law takes no notice, but which in a court of equity carried the beneficial interest and profits, and is still a creature of that court, as the use was before the statute."

In *Bogert, Handbook of the Law of Trusts*, 427, the author observes,

> "While legal scholars have disagreed as to whether the right of cestui que trust is in personam, in rem,

or partly both, the modern tendency is to give the right of cestui que trust incidents which make it, not only a right against the trustee to have the trust carried out, but also the equivalent of ownership of the trust res in equity."

He adds, on page 430,

"The situation would seem to be summarized by the statement that, while the right of cestui que trust was originally purely in personam against the trustee, it has been increasingly a right in rem and is now substantially equivalent to equitable ownership of the trust res. The cestui que trust, of course, also has rights in personam against the trustee."

In *3 Pomeroy Equity Jurisprudence*, Fourth Edition, 1928, Section 975, page 2117, the author states,

"In contemplation of courts of equity, equitable estates, according to their various degrees, are as truly property or ownership as legal estates are property in contemplation of courts of law. In fact, the entire dealing of equity with the subject of equitable estates, and the fundamental distinction between equitable and legal conceptions and modes, are based upon the notion that equitable estates are in the truest sense property, and not mere rights of action,—not mere rights to obtain certain equitable remedies. . . . In short, the equitable estate is often regarded by a court of equity as the real, beneficial, substantial ownership, while the corresponding legal estate is a mere form and shadow."

In *Salmond on Jurisprudence*, Section 90, page 228 (Fifth Edition, 1916), this appears:

"The trustee is destitute of any right of beneficial enjoyment of the trust property. His ownership, therefore, is a matter of form rather than of substance, and nominal rather than real. If we have regard to the

essence of the matter rather than to the form of it, a trustee is not an owner at all, but a mere agent, upon whom the law has conferred the power and imposed the duty of administering the property of another person."

In 4 *Kent's Commentaries* 303, the author says,

"The *cestui que trust* is seized of the freehold in the contemplation of equity. The trust is regarded as the land, and the declaration of trust is the disposition of the land."

Professor Austin W. Scott, of the Harvard Law School, states in the conclusion of his article on "*The Nature of the Rights of the Cestui Que Trust*," in *17 Columbia Law Review* 269, at page 289,

"It has been shown that the creation of a trust has always been regarded as a legal transaction quite different in its nature from the creation of an obligation. It has been shown that the rights of the *cestui que trust* in respect to their duration, transmission and alienation are treated like property rights rather than like obligations. It has been shown that the reasons usually urged as proving that the rights of the *cestui que trust* are obligations and not property rights do not establish that proposition; the *cestui que trust* may be beneficial owner though the trustee is legal owner; the nature of equitable remedies is not conclusive as to the nature of equitable rights; the fact that the trustee has some positive or affirmative duties is immaterial."

On page 290 the author continues:

"The trustee is a buffer between the *cestui que trust* and the world; as against the rest of the world he has the rights of an owner, and he has the duties of an owner; but these rights he holds for the benefit of the *cestui que trust*, and the burden of these duties he can,

> by the aid of a court of equity, shift to the trust property and even, in some cases, to the *cestui que trust* himself. But when it is necessary for the protection of the *cestui que trust*, equity will recognize that he is in very truth beneficial owner of the trust property."

See, also, Dean Pound's review of Willoughby, *The Legal Estate*, in 26 *Harvard Law Review* 462, at page 464.

Huston on *The Enforcement of Decrees in Equity* (1915) treats in Chapter VI (beginning at page 87) of "The Development of Equitable Interests into Real Interests." He shows (p. 98) that as early as 1647, Rolle, J., said in *Rex* v. *Holland*, Style 20, 21:

> "A trust is *not* a thing in action but may be an inheritance or a chattel as the thing falls out."

On pages 147 and 148, Huston says:

> "The cases, then, which involve transfers by cestui of his equitable estate, like those where the legal estate is transferred by the trustee by virtue of his power, show that cestui's interest is regarded as a genuine property interest. It is submitted that the following recent statement by an American judge phrases with accuracy the existing legal situation, as to the rights and powers of both cestui and trustee:
>
> "'Under our system the cestui que trust is the real owner of the property, and the trustee merely the depositary of the legal title. His is not a property right but a legal duty founded upon a personal confidence; his estate is not that which can be enjoyed but a power that may be exercised.'" (Quotation from *Arnold* v. *South Pine Lumber Co.*, 58 Tex. Civ. App. 186, 198 [1909].)

In an article written by the then Dean now Mr. Justice Stone in 1917, in 17 *Columbia Law Review* 467, on *"The Nature of the Rights of the Cestui Que Trust,"* the author

takes the opposite point of view, i. e., that for many purposes an equitable interest is a chose in action, no matter what may be the nature of the trust *res*. This Court has decided, however, that an equitable interest in property will be regarded as property of the same kind as the trust *res*, and not as a chose in action, in *Brown* v. *Fletcher*, 235 U. S. 589, cited *supra*. In *Allen* v. *Commissioner of Internal Revenue*, 49 Fed. (2d) 716 (C. C. A. 2, 1931), at page 718, Circuit Judge Learned Hand, speaking for the court, expresses the view that *Brown* v. *Fletcher*, *supra*, has decided for the federal courts that the *cestui que trust* has a present "equitable interest" in the *res*. We also respectfully submit that the Supreme Court of Ohio had uniformly, until the decision in this case, adopted the same rule of property, and that it has been followed or approved in tax cases by the highest courts of Massachusetts, Maine, Rhode Island, West Virginia, Tennessee and New Hampshire, and, so far as we have been able to find, has not been disapproved in any tax case decided by any American court of last resort, except the case at bar. The Ohio Supreme Court did not mention any of these cases or writers in its opinion.

In tentative draft No. 1 of *The Restatement of the Law of Trusts*, by The American Law Institute (March 10, 1930), Section 126, reads:

> "THE NATURE OF THE BENEFICIARY'S INTEREST.
>
> . . . . . .
>
> "(b) If the trust property is real property, the interest of the beneficiary is real property. . . ."

II. Interests in Real Estate Cannot, Under the Provisions of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, be Taxed by a State in Which the Real Estate is not Located

In *First National Bank* v. *Maine*, 284 U. S. 312, at page 326, this Court said:

> "It long has been settled law that real property cannot be taxed, . . . except by the state in which it is located."

In *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385, it was held that the exemption from taxation extends not only to physical property beyond the jurisdiction of the court, but to incorporeal rights therein and that a franchise granted to a Kentucky corporation by the proper authorities of Indiana, for maintaining a ferry across the Ohio River from the Indiana to the Kentucky shore, was an Indiana franchise, and as such an incorporeal hereditament derived from, and having its legal situs for purposes of taxation in, Indiana. The fact that the Kentucky corporation had also a Kentucky franchise to carry on the business from the Kentucky to the Indiana shore (the jurisdiction of Kentucky extending to low water mark on the northern and western side of the Ohio River), did not bring the Indiana franchise within the jurisdiction of Kentucky for purposes of taxation.

That a certificate evidencing the right is held in Ohio makes no difference. In *Selliger* v. *Commonwealth of Kentucky*, 213 U. S. 200, it was held Kentucky could not tax warehouse receipts for whiskey when the whiskey itself was exempt, because beyond the jurisdiction of the state. The decision of the Court of Appeals of Kentucky, which had sustained the tax, was reversed. Mr. Justice Holmes, delivering the opinion of this Court, said (page 204):

"So that it will be seen that the effect is the same as if the whiskey itself had been taxed, and the question is whether, by such a dislocation of the documents from the things they represent, a second property of equal value is created for taxing purposes, which can be reached although the first could not. Possibilities similar in economic principle sometimes have to be, or at least have been, recognized, but of course, economically speaking, they are absurd."

Further on (page 206) this court said:

"We take it to be almost undisputed that if the warehouses were in Kentucky the State would not and could not tax both the whiskey and the receipts, even when issued in Kentucky form, and that it would recognize that the only taxable object was the whiskey."

See, also, *City Bank Farmers Trust Co.* v. *Schnader*, 293 U. S. 112, decided November 5, 1934, in which it was held that Pennsylvania could levy an inheritance tax on pictures loaned by a resident of New York to an art museum in Pennsylvania for an indefinite period and still there at the time of decedent's death. The court said that the transfer could not be subjected to tax imposed by more than one state, and cited in support thereof:

Frick v. *Pennsylvania*, 268 U. S. 473, 488, 492;
Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83, 93;
Farmers Loan & Trust Co. v. *Minnesota*, 280 U. S. 204, 210;
First National Bank v. *Maine*, 284 U. S. 312, 326, 327.

While three of those cases involved inheritance taxes, as did *Beidler et al. Executors* v. *South Carolina Tax Commission*, 282 U. S. 1, and *Baldwin* v. *Missouri*, 281 U. S. 586, the same principles are applied to property taxes.

Johnson Oil Refining Co. v. *Oklahoma*, 290 U. S. 158;
Brooke v. *Norfolk*, 277 U. S. 27;

Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1, 38;
Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194, 209, 211.

It has been held that the income from real estate is not taxable under the New York income tax law, when the income received by a resident of New York is from land located outside of New York. *Pierson* v. *Lynch*, 237 N. Y. App. Div. 763, affirmed *per curiam* 263 N. Y. 533, *certiorari* dismissed as improvidently granted by this court on November 5, 1934, under title of *Lynch* v. *People of New York ex rel. Piersen*, 293 U. S. 52.

That even intangibles cannot be taxed at the domicile of the beneficiary, the trustee being a non-resident, see *Commonwealth* v. *Appalachian Electric Power Co.*, 159 Va. 462 (1932), certiorari denied 288 U. S. 613, and *Mayor and Council of Baltimore* v. *Gibbs*, — Md. — (171 Atl. 37 [1934]).

III. Ohio Cannot, Consistently with the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, Tax Some Interests in Real Estate on a Different Basis than It Taxes Others Where There is no Reason for the Classification

It is stipulated that the real estate inside as well as outside of Ohio on which the land trust certificates are issued, has been taxed in the customary way that all real estate is taxed, without deduction for the interest of the land trust certificate holders (R. 59). Under the Ohio Constitution, Article XII, Section 2 (113 Ohio Laws 790; see appendix) "Land and improvements thereon shall be taxed by uniform rule according to value." To tax appellant on his interest in real estate, in addition to the tax paid on the real estate itself, is a discriminatory method of taxation. It is like valuing the property of one person, for pur-

poses of taxation, higher than similar property. This has been held unconstitutional by this Court in *Concordia Fire Ins. Co. v. People of the State of Illinois*, 292 U. S. 535; *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239; *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20; *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 446; *Cumberland Coal Co. v. Board of Revision*, 284 U. S. 23.

In *Concordia Fire Insurance Co. v. People of the State of Illinois*, *supra*, at page 549, the court said:

> "The net receipts which are taxed are not different from those which are not taxed; and both come from the same source. Such a discrimination in respect of the taxation of real or tangible personal property obviously would be essentially arbitrary. In principle it is not different with the net receipts. They are property and the tax which section 30 imposes is, as the state court holds, a property tax. It follows that the section, when construed and applied in the way just described, is in conflict with the equal protection clause of the Constitution. Full support for this conclusion is found in prior decisions."

In *Chisholm v. Shields*, 67 O. S. 374 (1902), it was held that the beneficiary could not be taxed, as the trustee had already paid the taxes on the property, though trustee and beneficiary were both residents of Ohio.

IV. It is Unconstitutional Discrimination to Tax Equitable Interests in Land "Divided into Shares Evidenced by Transferable Certificates" and to Exempt from Taxation (a) the Same Equitable Interests When Not Represented by Such Certificates; (b) Legal Interests in Land, Whether Divided into Shares or Not, and Whether Represented by Transferable Certificates or Not.

The land trust certificate the holder receives is merely the evidence of his interest in property, and has no value

in and of itself. It is not negotiable, like a bond or a note, or like a stock certificate in those jurisdictions where the Uniform Stock Transfer Act is in effect. The owner's only right is to receive what the trustee receives, but he has an absolute right to that. Thus his interest is different from that of the stockholder, who has rights as to the corporation itself, but whose rights to receive money or property are ordinarily controlled by the board of directors.

The interest of a land trust certificate holder can only be transferred by a form of conveyance, which might just as well be on an entirely separate instrument as on the certificate itself, except for the convenience of the trustee in recording the transfer. A state has no right to tax evidence of the interest in property, apart from the thing itself. *Selliger* v. *Kentucky*, 213 U. S. 200, *supra*.

The Ohio Supreme Court in *Cassidy* v. *Ellerhorst*, 110 O. S. 535 (1924), held that as Ohio could not levy a tax on the intangible property of a deceased resident of Kentucky, it could not levy such a tax when the evidences of such property, certificates of stock and the bonds, were in a safety deposit box in Ohio. That is, if the property which the certificates evidenced was not in Ohio, then the fact that the evidence of the property was in Ohio gave Ohio no jurisdiction to tax. At page 545, Chief Justice Marshall said:

> "It is a well-settled principle, so far as Ohio jurisprudence is concerned, that the shares of stock are property, but that the certificates are only the evidence of the ownership of those shares, and that they amount to no more than the title deeds of real estate. The certificates are a great convenience, and of great value as evidence, but they are certainly no more than evidence."

The court mentions title deeds of real estate as evidence of title and not as representing the title itself.

See, also, *State* v. *Davis*, 85 O. S. 43, 56 (1911), and *Ball* v. *Towle Manufacturing Company*, 67 O. S. 306, 314 (1902).

What is the basis for distinguishing between equitable interests evidenced by so-called transferable certificates and equitable interests not so evidenced? One class is just as easily transferable as the other. Both require that the transfer be executed with the formalities required for the transfer of an interest in real estate; that is, signature by the owner in the presence of two witnesses, who sign as witnesses, and acknowledgment before a notary public, who certifies to the acknowledgment (R. 72-75, 80-82). Dower must be released to give good title in either case (R. 72).

Suppose a man who had several children and grandchildren were to declare himself trustee for them and write each a letter telling them what he had done and what their respective interests were. Under the terms of the statute, the beneficial interests would not be taxed. Suppose, however, instead of merely writing them a letter, he issued a certificate showing the interest that each had, and in order that they should not make any mistake in case they wished to sell or give away their interest in the trust, on the face of the certificate he gave instructions as to how the transfer should be executed and put a form of transfer thereon. The children and grandchildren would have no different interest in one case than in the other. Yet, under the construction placed upon *Section 5323* of the General Code by the Supreme Court of Ohio, the beneficial interests would be taxed only in the second case. See, *Morrison* v. *Manchester*, 58 N. H. 538, cited in 1926 *Opinions of Attorney General*, 376 and 377, *supra*.

Suppose, again, that this man, in place of declaring himself trustee, conveyed undivided interests to his children and grandchildren, but at the same time took back, as a

condition of the conveyance, an irrevocable power of attorney to manage the property, collect the rents and distribute the proceeds, taking a certain percentage as compensation for so doing. In that case, whether he designated himself trustee or not and whether he issued "transferable" certificates or not, the statute does not tax the beneficial interests. If a lease were made of the property under terms that required the lessee to pay the taxes and the property were listed in the name of the lessee, then the beneficiaries would have no tax to pay.

The owner of land, the title of which is registered under the Torrens Act, gets a certificate from the Recorder (G. C. 8572-23) and transfers his title by an assignment endorsed thereon (G. C. 8572-37). No one would contend this certificate is taxable.

It would be just as logical to say that a person would have to pay an annual property tax on real estate that he received by deed, but would not have to pay a tax on real estate received by inheritance. It is illogical and discriminatory, in violation of constitutional rights, to levy a property tax on property acquired in a certain manner or evidenced in a certain way, when other property, acquired in a different manner or evidenced in a different way, but giving the owner the same property rights, is not taxed.

It has been held that a landlord could not be taxed on capital estimated sufficient to produce an income equal to the net rental of his property, the property being also taxed and the tax paid by the tenant as part of the rental. *Keasard* v. *City of Manchester*, 68 N. H. 61 (1894).

This Court has always held that a classification of property for purposes of taxation, not based on any logical reason, but arbitrarily, is an unconstitutional violation of rights under the Fourteenth Amendment to the Federal

Constitution. For instance, a statute basing a tax on corporations on the gross receipts derived from the operation of taxicabs, which does not tax like receipts of individuals and partnerships, rests on a purely arbitrary basis and is void because it violates the guarantees of the Fourteenth Amendment. *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389.

Bank stocks cannot be taxed on a different basis than stocks of other monied institutions performing similar services. *Iowa Des Moines National Bank v. Bennett*, 284 U. S. 239.

The Court of Appeals of New York, in holding a stock transfer law invalid, in *State ex rel. Farrington v. Meusching*, 187 N. Y. 8 (1907), 19, stated:

> "Even if a tax on farms according to acreage might be sustained, it is obvious that a tax on farms according to the number of fields into which they are divided would not be valid. Such a classification would not treat all in the same class alike, and would impose a heavier burden upon one farm than upon another of the same size, situation and value. A statute imposing such a tax would not give 'that equal protection and security' to which all, under like circumstances, are entitled 'in the enjoyment of their personal and civil rights.'"

See *Louis K. Liggett Co. v. Lee*, 288 U. S. 517 and *Royster Guano Co. v. Virginia*, 253 U. S. 412.

In *Healy v. Ratta*, 67 Fed. (2d) 554 (C. C. A. 1, 1933), the New Hampshire hawkers' and peddlers' act was held to contain so many discriminatory provisions and unreasonable classifications as to render the entire act void. This act exempted citizens of New Hampshire over seventy years of age from paying any license fees, and there were other discriminatory provisions and unreasonable

classifications. See, especially, pages 557 and 558 of the opinion.

The fact that it is rights that are subject to tax, not evidences of the rights, is further illustrated by two recent cases in Federal Circuit Courts of Appeals, as follows:

In *Reinecke* v. *Kaempfer*, 72 Fed. (2d) 469 (C. C. A. 7, 1934), the court taxed a business trust as an "association" under the Federal Revenue Act of 1924, even though no certificates of stock or of interest in the trust were issued. The fact that it was a management trust was sufficient.

In *Commissioner of Internal Revenue* v. *Guitar Trust Estate*, 72 Fed. (2d) 544 (C. C. A. 5, 1934), the first paragraph of the syllabus reads:

> "Where husband and wife created voluntary trust for benefit of children by donating to trustees for children eight-tenths of their property, reserving to each of themselves only a child's share, and beneficiaries as such had no voice in management of trust and no power to dispose of their beneficial interests or to select their trustees, and trustees were authorized to continue going business, trust estate *held* not 'association' as regards computation of income tax."

The tax in the case at bar purports to tax as an intangible under an expressly labeled intangible or personal property tax act, something that the Legislature itself termed an interest in land. It exempted all other similar interests in land and rents derived therefrom. It sought to tax a specific real property interest only when evidenced in a certain way and not when evidenced in any other way.

In *Smith* v. *Cahoon*, 283 U. S. 553, this court held unconstitutional a state statutory provision which required those who operate motor vehicles on the highways in the transportation of goods for hire to furnish a bond or insurance policy for the protection of the public against injuries

received through negligence in such operation, but which did not apply to those "engaged exclusively in transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimps from the point of production to the assembling or shipping point en route to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products." This court, speaking through Mr. Chief Justice Hughes, said on pages 366 and 367:

> "The constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the State's action. In the present instance, the regulation as to the giving of a bond or insurance policy to protect the public generally, in order to be sustained, must be deemed to relate to the public safety. This is a matter of grave concern as the highways become increasingly crowded with motor vehicles, and we entertain no doubt of the power of the State to insist upon suitable protection for the public against injuries through the operations on its highways of carriers for hire, whether they are common carriers or private carriers. But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made.' *Air-Way*

Corp. v. *Day*, 266 U. S. 71, 85; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 563, 564; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417; *Truax* v. *Corrigan*, 257 U. S. 312, 332, 333; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 37."

V. The Ohio Intangible Tax Act Does Not Levy An Income Tax on Land, and If It Did, Such Levy Would Be Unconstitutional As to Appellant

It would not be necessary to argue this question here were it not for the ambiguity created by the language of the second paragraph of the syllabus in the principal case in 128 O. S. 597, the last sentence of which reads:

> "Section 5323, General Code (114 Ohio Laws, 715), does not provide for a tax against the equitable interests in land but does provide a tax against the income derived from such equitable interests."

The next paragraph of the syllabus seems to qualify the sentence just quoted, for it reads as follows:

> "Such certificates represent intangible rights within the purview of Section 5323, General Code (114 Ohio Law, 715), and are taxable as such, notwithstanding the fact that the particular real estate out of which such rights issue is likewise taxed."

This court will determine, in considering the constitutional questions presented, the nature of the tax imposed by the State of Ohio. *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, at page 625; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, at page 387; *Lawrence* v. *Mississippi*, 286 U. S. 276, at 280.

If this were an income tax, we submit that it would involve an unlawful discrimination, in violation of the rights guaranteed by the Fourteenth Amendment to the Constitution, inasmuch as the owners of equitable interests in real

estate divided into shares represented by transferable certificates are the only persons in Ohio who are subjected to taxes on the "income yield" in addition to the customary property taxes levied and assessed on the real estate itself.

In *Pollock v. Farmer's Loan & Trust Co.*, 157 U. S. 429, this court held that an income tax on the income from land was a direct tax on the land. Mr. Chief Justice Fuller, who wrote the opinion of the court in that case, said (pages 580-581):

> "The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. . . .
>
> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court."

In *Pierson v. Lynch*, 237 N. Y. App. Div. 763, affirmed in 263 N. Y. 533 (cited *supra*), it was held that New York could not tax a resident of that state on rental received by her from real property owned by her and located in Ohio. It is submitted that this decision is correct and that Ohio would not have jurisdiction to tax the income received by one of its residents from rentals from real estate located in another state.

The act in question (114 O. L. 714, *et seq.*), is not an income tax. As has been previously shown, it is entitled

> "An Act providing for the levy of taxes on intangible property at classified rates and for the assessment of tangible personal property for taxation."

The purpose of the act was to impose a property tax on intangible and other personal property, in place of the former uniform tax which was required before the amendment of Section 2 of Article XII of the Constitution of Ohio in 1930, the pertinent part of which formerly read:

> "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money," (3 Page's Annotated Ohio General Code 6550).

The intangible tax is based on "investments," as defined in Section 5323 (114 O. L. 715). "Income yield," not income, was made the basis of taxation, and investments were taxed at five per cent of income yield. Section 5638 (114 O. L. 722).

"Income yield," as used in the act (G. C. 5389):

> "Means the aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year" (i. e., the tax year).

If income yield, as so defined, were made the basis of an income tax, as distinguished from a property tax, then the act in this respect would be clearly unconstitutional, as neither the State of Ohio nor the Federal Government may impose an income tax on a person based on income

which he does not receive. *Hooper* v. *Tax Commission of Wisconsin*, 284 U. S. 206 (1931). The appellant acquired the East Sixth St., Cleveland, Ohio, land trust certificate on May 29, 1931 (R. 79), after two quarterly installments of rental had already been paid during the tax year (R. 77). The petition was filed in 1932 to enjoin the tax based on the previous year's "income yield" (R. 42-43).

The tax here in question cannot be called an income tax, nor even a gross receipts tax, because it is not based on the income or gross receipts *of the taxpayer*. The conclusion must be that "income yield" was used as a basis for determining a property tax. This is evident from the report of the Special Joint Taxation Committee on the Revision of the Ohio Taxation System. In commenting upon Section 5389, Honorable Robert A. Taft, Chairman of the Committee, in referring to the phrase "income yield," says:

> "'Income yield,' as defined in the second paragraph, means the actual income yield on the investment, whether received by the person who owned it on listing day or not. In other words, the tax is a property tax measured by income yield, and not an income tax on the owner." (See the pamphlet published by The W. H. Anderson Company on the new Ohio Intangible Tax Law, annotation under Section 5389, repeated in Page's Annotated Ohio General Code, Permanent Supplement 1926-1935, page 783.)

In *Friedlander* v. *Gorman*, 126 O. S. 163 (1933), Judge Stephenson, who delivered the opinion for the majority of the court and wrote the opinion in the principal case, said (page 169):

> "The intangible tax is a personal property tax."

Section 5638 shows the intent of the Legislature in imposing property, not income, taxes as follows:

"Classification of intangible property and rate of taxation.

". . . taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated . . . at the following rates, to wit:

'Investments, five per centum of income yield; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; shares in and capital employed by dealers in intangibles, five mills on the dollar; capital and surplus of domestic insurance companies, five mills on the dollar; and moneys, credits and all other taxable intangibles so listed, three mills on the dollar.' "

The receipt which appellant received for his taxes, lists Classified Personal Property to be taxed, as follows:

"Investment at Income Yield	5%
Investment Unproductive	.2%
Deposits Outside Ohio	.2%
Credits	.3%
Money and Other Taxable Intang.	.3%"

Exhibit 21 (R. 140). This shows that the tax was obviously a property tax and so considered by the taxing officials. It would be an illegal discrimination to levy an income tax on income yield on investments and a property tax on all other intangibles.

The Supreme Court of Ohio attempted to justify the tax on the basis of this Court's decision in the case of *Maguire v. Trefry, Tax Commissioner of Massachusetts*, 253 U. S. 12, 17 (128 O. S. at page 607). In that case, this court upheld the Supreme Judicial Court of Massachusetts in sustaining a Massachusetts income tax on the income received by a *cestui que trust* from *intangible personal property* held by a foreign trustee on which property *the state*

of trustee's domicile had placed no tax. Therefore, the decision in *Maguire* v. *Trefry* is not applicable to our case, in which the tax is a property tax and the trust *res* has already been taxed as real estate. Moreover, it is questionable whether *Maguire* v. *Trefry* is not one of the opinions that was overruled by the decision of this court in *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83. See, *Allen* v. *Commissioner of Internal Revenue*, 49 Fed. (2d) 716, 718.

CONCLUSION

Equitable interests in land divided into shares evidenced by transferable certificates are, by *Section* 5323, conclusively denominated interests in land. By settled rules of construction, which had become rules of property before the certificates in question here were issued, equitable interests in land in Ohio had been classed as real property. The certificates representing these interests may not be taxed any more than a deed could be taxed apart from the land it conveys or a warehouse receipt apart from the commodity it represents. As to real property outside the State of Ohio, there can be no question that it may not be taxed by Ohio. Since the land trust certificate holder's interest is an interest in real property, attempted taxation thereof where the property is located outside of Ohio is illegal as taxing real property beyond the jurisdiction of the taxing state. The attempted tax is not an income tax and even if it were, could not be levied only on this one species of property or on income derived from real estate located outside of Ohio.

The real estate in which appellant has an interest has been taxed to the lessor or the lessee for its full value. To tax these particular equitable interests, in addition to the legal interests, when other real estate is not taxed on both,

is double, discriminatory taxation and, therefore, unconstitutional.

To tax, under an intangible and personal property tax law, only equitable interests in real estate divided into shares evidenced by transferable certificates, and expressly to exempt exactly similar interests not so evidenced, and also expressly to exempt similar legal interests evidenced or not evidenced by transferable certificates, is an arbitrary classification depriving holders of such certificates of the equal protection of the laws.

The judgment below should, therefore, be reversed.

Respectfully submitted,

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APPENDIX

Statutes and Constitutional Provisions Cited

Section 2 of Article XII of the Constitution of Ohio (in effect at time in question):

No property, taxed according to value, shall be so taxed in excess of one and one-half per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value. All bonds outstanding on the first day of January, 1913, of the state of Ohio or of any city, village, hamlet, county or township in this state, or which have been issued in behalf of the public schools of Ohio and the means of instruction in connection therewith, which bonds were outstanding on the first day of January, 1913, and all bonds issued for the world war compensation fund, shall be exempt from taxation, and, without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions, therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law. (113 O. L. 790.)

General Code of Ohio, Section 710-140. A savings bank may invest its funds in:

. . . . . .

(d) Ground rents or certificates of participation or beneficial ownership in improved lands under lease for a period of not less than twenty-five years from the date thereof, and conditioned that the lessee shall pay all taxes and

assessments thereon and keep and maintain said premises in full and complete repair, with insurance in an amount equal to the insurable value of the improvements thereon, provided that the aggregate par amount of such rents or certificates shall not exceed the value of the land nor sixty per cent of the total value of the land and improvements. But nothing in this section contained shall prevent the investment in such rents or certificates in unimproved lands, where by the terms of the lease thereof the construction of a new building thereon is provided for and funds have been deposited or will be deposited from the proceeds of the sale of such rents or certificates sufficient for the cost of such construction, and conditioned that such construction shall begin within six months thereafter and that the funds so deposited shall be paid out to meet the cost of such construction as the work progresses and for no other purpose. (108 O. L., Part 1, 116.)

General Code of Ohio, Section 5322, appears in full at the bottom of page 4 of the brief.

General Code of Ohio, Section 5323. "Investments" defined.

The term "investments" as used in this title, includes the following:

Shares of stock in corporations, associations and joint stock companies, under whatever laws organized or existing, excepting (1) those in such corporations and associations as constitute instrumentalities of the federal government for the taxation of which by the several states no provision is made by act of the congress of the United States, (2) those in financial institutions, dealers in intangibles and domestic insurance companies as defined by chapter four of this title, and (3) such as are defined in this chapter as "deposits."

Interest bearing obligations for the payment of money, such as bonds, certificates of indebtedness, debentures and notes; certificates of deposit, savings and other like deposits in financial institutions outside of this state yielding income by way of interest or dividends in excess of four per centum of the principal sum withdrawable; and other similar evidences of indebtedness, whether negotiable or

not, and whether or not secured by mortgage of or lien upon real or personal property or income, by whomsoever issued, excepting such as have been issued (1) by the United States or any of its territories, districts, or dependencies, or (2) by any instrumentality of the federal government, or (3) prior to the first day of January, 1913, by the State of Ohio or any political or other subdivision or school district in this state and (4) bonds of the state of Ohio issued pursuant to article VIII, section 2a of the constitution of Ohio and (5) such as are defined in this chapter as "deposits" and "current accounts."

Annuities, royalties and other contractual obligations for the periodical payment of money and all contractual and other incorporeal rights of a pecuniary nature whatsoever from which income is or may be derived, however evidenced, excepting (1) patents and copyrights and royalties derived from each, (2) interests in land and rents and royalties derived therefrom, other than equitable interests divided into shares evidenced by transferable certificates and (3) employment and partnership contracts and salaries and wages derived therefrom.

All equitable interests, life or other limited estates and annuity interests in any investment hereinbefore described, or in any fund made up of any such investments, wherever located.

When any corporation provides and carries out a plan for the allotment and sale of any or all of its unissued shares, or of shares purchased or to be purchased, to the employees of the corporation or to the employees of subsidiary corporations or to a trustee on their behalf, and for the payment of such shares in installments or at one time, and for the establishment of a special fund or funds in which such employees during the period of their employment or other period of time may be privileged to share on such terms and conditions as may be imposed in respect thereof; the relationship between the corporation or the trustee, if any, and each employee shall, for the purpose of determining the tax upon the shares concerned or upon any interest in them, be deemed to be a trust, and any tax upon the said shares or any interest in them shall be levied and assessed accordingly. (114 O. L. 715.)

General Code of Ohio, Section 5328. Property to be entered on general tax list and duplicate. All real property in this state shall be subject to taxation, except only such as may be expressly exempted therefrom. All personal property located and used in business in this state and all domestic animals kept in this state, whether used in business or not shall be subject to taxation, regardless of the residence of the owners thereof. All ships, vessels and boats, and shares and interests therein, defined in this title as "personal property," belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, shall be subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property as prescribed in this title. (114 O. L. 717.)

General Code of Ohio, Section 5388. Rules for listing and assessing personal property.

Excepting as herein otherwise provided, personal property shall be listed and assessed at seventy per centum of the true value thereof, in money, on the day as of which it is required to be listed, or on the days or at the times as of which it is required to be estimated on the average basis, as the case may be. Deposits not taxed at the source shall be listed and assessed at the amount thereof in dollars on the day as of which they are required to be listed. Moneys shall be listed and assessed at the amount thereof in dollars on hand on the day as of which they are required to be listed. In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, excepting as otherwise provided in this chapter, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either of the first two subparagraphs of section 5323 of the General Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at the true value thereof, in money, on the day as of which such investments are required to be listed.

Credits and other taxable intangibles shall be listed and assessed at the true value thereof, in money, on the day as of which the same are required to be listed.

Personal property of the following kinds, used in business, shall be listed and assessed at fifty per centum of the true value thereof, in money, on the day as of which it is required to be listed, or on the days or at the times as of which it is required to be estimated on the average basis, as the case may be:

(1) All engines, machinery, tools and implements of a manufacturer mentioned in section 5386 of the General Code, and all engines and machinery of every description used, or designed to be used in mining, and all tools and implements of every kind used, or designed to be used for such purpose, excepting or provided in the last paragraph of this section, and all engines, machinery, tools, implements and domestic animals used in agriculture.

(2) The average value of all articles purchased, received or otherwise held by a manufacturer for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying or refining; the average value of all articles which were at any time by him manufactured or changed in any way, either by combining or rectifying, or refining or adding thereto, but not including finished products unless kept or stored at the place of manufacture or at a warehouse in the same county therewith; and agricultural products on farms.

Boilers, machinery, equipment and personal property used for the generation or distribution of electricity other than for the use of the person generating or distributing the same shall be listed and assessed at the true value thereof in money, on the day as of which they are required to be listed, anything in this section to the contrary notwithstanding. (114 O. S. 720.)

General Code of Ohio, Section 5389. Application of term "true value in money"; "income yield" defined.

As used in section 5388 of the General Code and elsewhere in this chapter, the "true value in money" of any property means the usual selling price thereof at the time or times and place as of which it is required to be listed;

but if there is no usual selling price known to the person whose duty it is to fix a value thereon, then, such price as is believed could be obtained therefor in money, at such time or times and place. In the case of personal property used in business, the book value thereof, if any, less book depreciation, at such time or times, shall be listed and such depreciated book value shall be taken to be the true value of such property, unless the assessor shall find that such depreciated book value is greater or less than the then true value of such property in money. Claim for any deduction from depreciated book value must be made in writing by the taxpayer at the time of making return; and when such return is made to the county auditor and required by this chapter to be transmitted to the commission for assessment, the county auditor shall, as deputy of the commission, investigate such claim and shall enter thereon, or attach thereto, in such form as the commission may prescribe, his findings and recommendations with respect thereto; when such return is made to the commission such claim for deduction shall be referred to the auditor of each county wherein the property affected thereby is listed, as such deputy, for investigation and report.

"Income yield" as used in section 5388 of the General Code and elsewhere in this title means the aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year, and includes the following:

In the case of an obligation bearing interest, the amount of interest separately charged and paid during such year, if any, exclusive of payments on the principal; in the case of shares of stock, the cash dividends so paid; in the case of annuities or other obligations for periodical installment payments including both principal and interest, not separately charged and paid, four per centum of half of the principal used to purchase the same, or, if there be no such principal, four per centum of half of the present worth of such payments if commuted, which shall be calculated, as of the date on which such investment is required by this chapter to be first listed, with interest at four per centum per annum and, in the case of annuities for life or lives,

according to the Combined Annuity Four Per Cent. Table; in the case of equitable interests, the cash distributions of income so made. At the request of the commission or of any county auditor, the superintendent of insurance shall, upon being furnished with a statement of the facts, compute upon a basis equivalent to that herein prescribed, the income yield of any investment as to which the interest is not charged and paid separately from the principal thereof, and the assessor shall be governed by the computation so made. (114 O. L. 721.)

General Code of Ohio, Section 5638. Classification of intangible property and rate of taxation.

For the purpose of the general revenues of the municipal corporations, school districts and special taxing districts in this state, and to lessen the burden of general taxation on real property, taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the grand classified tax list and duplicate of the state of Ohio at the following rates, to-wit: investments, five per centum of income yield; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; shares in and capital employed by dealers in intangibles, five mills on the dollar; capital and surplus of domestic insurance companies, five mills on the dollar; and moneys, credits and all other taxable intangibles so listed, three mills on the dollar. (114 O. L. 722.)

General Code of Ohio, Section 11590. (3 General Code of Ohio, 1910, page 2840.) When judgment to operate as a conveyance.

When the party against whom a judgment for a conveyance, release, or acquittance is rendered, does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available, as if the conveyance, release, or acquittance had been executed conformably thereto.